IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.2.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE R.SUDHAKAR

W.P.No.11375 of 2002
&
W.P.M.P.No.15333 of 2002

M.Gomathi .. Petitioner

vs.

1. The State of Tamil Nadu, rep. by
its Secretary to Government,
Health & Family Welfare Department,
Fort St.George,
Chennai-600 009.

2. The Commissioner, Adi Dravidar & Tribal Welfare,
Chepauk,
Chennai-600 005.

3. The Director of Medical Education,
Kilpauk,
Chennai-600 010.

4. The Dean,
Government Stanley Hospital,
Chennai.

5. The Registrar,
Tamilnadu Administrative Tribunal,
Chennai. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of certiorarified mandamus, as stated therein.

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For petitioner : Ms.T.Ananthi
For respondents : Mr.V.Raghupathi,
Government Pleader for RR-1 to 4
R-5 Tribunal

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ORDER

R.SUDHAKAR,J.

The prayer in the writ petition is for issuance of a writ of certiorarified mandamus, calling for the records on the file of the fourth respondent in connection with Ref.No.20901/E1/2/1995, dated 5.1.1999 and on the file of the fifth respondent in connection with the order dated 15.3.2002 in O.A.No.544 of 1999 and O.A.No.503 of 2002 and quash the same and consequently direct the respondents to regularise the service of the petitioner with effect from 7.9.1993 by condoning the break in service and grant all consequential service and monetary benefits.

2. Heard learned counsel for the parties.

3. The petitioner belonging to the B.C. community and fully qualified was appointed as a Social Worker by the fourth respondent under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules by his proceedings dated 7.9.1993. The petitioner was sponsored by Employment Exchange. Subsequently she was removed for administrative reasons on 30.11.1995. On the basis of the appeal dated 31.1.1996 preferred by the present petitioner, by an order of the fourth respondent, she was again allowed to continue with effect from 28.2.1996 on condition that she will not claim any right by virtue of the temporary appointment and worked as such till 6.1.1999. The fourth respondent by proceedings dated 5.1.1999, on the basis of the instruction received from the second respondent passed an order of removal, solely on the ground that the petitioner belonged to the B.C. community, whereas, the vacancy is meant for SC/ST community according to communal rotation. Subsequently, the petitioner filed O.A.No.544 of 1999, wherein, by order dated 28.1.1999, the proceedings dated 5.1.1999 was stayed and the petitioner was allowed to rejoin on 10.5.1999.

4. Thereafter, since several regular vacancies have arisen due to retirement, the petitioner filed O.A.No.503 of 2002 claiming regularisation of service in Backward Community category. Both the O.As. were taken up by the Tribunal and by a common order dated 15.3.2002, the Tribunal, while dismissing the Original Applications, recommended to the Government in the following manner:-

> " .... 4. I can only recommend to the Government that if there is a vacancy, the vacancy can be filled up by allowing the applicant to continue in the post. The applicant is not entitled as a matter of right for permanent appointment in the Department. It is open to the

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> Government to consider the case of the applicant and similarly placed persons in view of the long service they have put in. The Applications are however liable to be dismissed. The applications are ordered to be dismissed subject to the observation made above."

5. Thereafter, the present writ petition has been filed against such a common order of the Tribunal. While admitting the writ petition, a Division Bench of this Court, by an order dated 5.4.2002, granted the following relief to the petitioner in W.P.M.P.No.15333 of 2002:

> "Learned counsel for the petitioner states that the petitioner is in service as on today. Even though the direction is to seek for permanent status in the post which the petitioner is holding, we cannot grant the same at this juncture. However, we make it clear that if the petitioner is working even temporarily as 10(a)(i) candidate as on today, she shall continue in service until further orders. Notice."

It is not disputed that the petitioner is continuing in service in such capacity.

6. Learned counsel for the petitioner filed additional affidavit of the petitioner and additional typed set of papers and submitted as follows:

Several Social Workers had retired and have been transferred during the period in which she was working as Social Worker. Therefore, she should have been fitted in any one of the vacant posts in the B.C. Category as and when the vacancy arose. A representation dated 5.2.1999 was made by the petitioner to the appropriate authority in this regard and the same has not been considered on merit. Subsequently, on 22.12.2001, she made another representation for regularisation. In this representation also, she has referred to the vacancy which arose out of the retirement and transfer of three persons and therefore, prayed for absorbing the petitioner in any of the said vacancy. Again on 31.3.2002, she made further representation to the authorities stating that the vacancy in respect of BC, MBC has not been filled up and petitioner should be considered for regularisation. On 11.8.2003, she sent yet another representation to the first respondent giving the details of the eight vacancies to the post of Social Worker on several dates and the community to which the vacancy was to be allotted. In the said list, there are several vacancies for BC and MBC candidates. Therefore, petitioner once again sought for regularisation in any

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one of the eight vacancies on the ground that she belongs to MBC category and has served in the institution for more than 12 years. The learned counsel for petitioner also referred to the proceedings dated 9.6.2005 of the fourth respondent where he has held that the petitioner is liable to pay her contribution to the General Provident Fund with effect from March 1994. As per the Annexure to the communication dated 9.6.2005, the petitioner's date of joining is stated as 8.9.1993 and the petitioner was directed to deposit arrears of Rs.63,915/- besides paying the contribution for the future.

7. Learned counsel for the petitioner therefore contended that the Department had accepted the fact that she is in service from 8.9.1993. It was contended that though her appointment was initially under the SC and ST quota for want of qualified hands, she should be considered as having been appointed under BC quota as and when vacancy arose, the details of which have been set out in the various representations made to the respondents. In any event, it was submitted by learned counsel for the petitioner that since no qualified person from the SC and ST community was available for several years, there can be no impediment in absorbing the petitioner in the post meant for SC and ST in view of the non-availability of candidates belonging to SC and ST category. The reservation for SC/ST candidate can be adjusted in the subsequent vacancy by applying the 'carry forward' rule. It was also submitted that one Tmt.Y.Rose Mary had obtained similar orders for regularisation from the respondent-Tribunal and the official respondents have accepted the order and regularised her. Petitioner pleads for similar treatment to her also. In this connection, learned counsel for the petitioner would rely upon the following judgments of the Supreme Court reported in 1995 (29) Administrative Tribunals Cases 349 (State of Bihar vs. Bageshwari Prasad) and 1995 (31) Administrative Tribunals Cases 772 (Jogendra Sethi vs. Rabindranath Behura and others):

> 1995 (29) Administrative Tribunals Cases 349:
>
> "4. ... Therefore, the general candidates, when were promoted to the post of Office Superintendent, the second vacancy which ought to have been reserved for Scheduled Castes and fourth for Scheduled Tribes, have been filled by the general candidates since Scheduled Castes and Scheduled Tribes were not, then available. When sixth vacancy had arisen, the claim of the reserved candidate was available and the authorities are enjoined to consider the claim of the reserved candidate. The High Court was clearly in error in relying the ratio in Paswan Case (1988 (2) SCC 214) which stood entirely on a different situation to hold that the post cannot be reserved. Under these circumstances, the order

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of the High Court is set aside and the second respondent was rightly considered for promotion and was legally promoted as Superintendent. The writ petition stands dismissed. The appeal is allowed. But in the circumstances without costs."

1995 (31) Administrative Tribunals Cases 772:

"7. In the present case after the promotion of a candidate from general category in 1982 the post of Head Typist became available for promotion only in 1988 and there was no recruitment by promotion on that post in between. Therefore, the next recruitment year after 1982 was 1988. Having regard to the carry-forward rule the post of Head Typist which became available for promotion in 1988 had to be assigned to the Scheduled Caste candidate and the Departmental Promotion Committee did so rightly. The tribunal was in error in holding that the said post could not be assigned to a Scheduled Caste as per the carry-forward rule."

8. Therefore learned counsel for the petitioner submitted that even if the petitioner's claim is not considered as per the abovestated ruling, since the petitioner was appointed through Employment Exchange and fully qualified and having served in the institution for 12 years, her claim for regularisation should be considered on the date on which the vacancy arose in the MBC/BC community category. Counsel for the petitioner submitted that petitioner having reached the age of 36, will not be able to get new employment. It was submitted that petitioner's right under the Constitution of India has been affected.

9. After having heard the learned counsel for both parties, and after going through the impugned order, in law, it cannot be said that there is any illegality in such an order of the Tribunal. However, the fact remains that the respondents have not filled up the post in the regular basis for several years, may be, because of the non-availability of a suitable candidate. Moreover, the petitioner has apparently gained valuable experience as a Social Worker and has rendered a service for more than 12 years. This fact cannot be ignored.

10. There is much force in the contention of the learned counsel for the petitioner that there are several vacancies in the MBC and BC categories due to retirement and transfer of Social Workers, the details of the same are set out in the representations referred to above. This fact is not disputed by the respondents. Several representations have been made by the petitioner to

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regularise her in the said vacancies of MBC/BC category. There cannot be any impediment for the respondents to consider the claim of the petitioner for regularisation in the BC/MBC category in view of the fact that she has been sponsored by Employment Exchange and she is fully qualified to hold the post. Therefore, the claim of the petitioner that she should be considered for appointment in the BC category has to be accepted. The respondents in proceedings dated 9.6.2005 have accepted that she is in employment since 8.9.1993 and they have directed her to pay the GPF contribution from March 1994. Therefore, the petitioner's claim for regularisation should be considered on the basis of the vacancy available in the MBC/BC category that has occurred during the relevant period in any event on and after 8.9.1993. The petitioner may be allowed to continue in the post which she is now occupying until such procedure is completed.

11. With the above observations, the writ petition is disposed of. No costs. W.P.M.P. is closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

cs

To

1. The Secretary to Government,
   State of Tamil Nadu,
   Health & Family Welfare Department,
   Fort St.George,
   Chennai-600 009.

2. The Commissioner, Adi Dravidar & Tribal Welfare,
   Chepauk,
   Chennai-600 005.

3. The Director of Medical Education,
   Kilpauk,
   Chennai-600 010.

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4. The Dean,
   Government Stanley Hospital,
   Chennai.

5. The Registrar,
   Tamilnadu Administrative Tribunal, Chennai.

1 cc to M/s. T. Ananthi, Advocate, Sr. 9391
1 cc to the Govt. Pleader, Sr. 9286

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